No. 16-1519

In the Supreme Court of the United States

SERGIO FERNANDO LAGOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: JUNE 15, 2017
CERTIORARI GRANTED: JANUARY 12, 2018

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* Except for the docket entries from the district court and court of appeals, the remaining material in this joint appendix was originally filed under seal in the district court. The district court has since granted a motion to unseal that material. See D. Ct. Doc. 247 (Feb. 22, 2018).

The following opinions, decisions, judgments, and transcripts have been omitted in printing the joint appendix because they already appear on the following pages in the appendix to the petition for a writ of certiorari:

Appendix A: Court of appeals opinion (Mar. 23, 2017) 1a
Appendix B: District court judgment (Feb. 18, 2016) 12a
Appendix C: Trial transcript of the sentencing proceeding (Feb. 8, 2016) 28a
Appendix D: Court of appeals judgment (Mar. 17, 2017) 40a

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20146

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

SERGIO FERNANDO LAGOS,
Defendant-Appellant

DOCKET ENTRIES

DATE	PROCEEDINGS
03/03/2016	DIRECT CRIMINAL CASE docketed. NOA filed by Appellant Mr. Sergio Fernando Lagos [16-20146] (RLL)
	* * * * *
05/17/2016	SUFFICIENT APPELLANT'S BRIEF FILED. Sufficient Brief deadline satisfied. Paper Copies of Brief due on 05/31/2016 for Appellant Sergio Fernando Lagos. [16-20146] * * *.
05/17/2016	SUFFICIENT RECORD EXCERPTS FILED. Sufficient Record Excerpts deadline satisfied. Paper Copies of Record Excerpts due on 05/31/2016 for Appellant Sergio Fernando Lagos. [16-20146] * * *.

DATE	PROCEEDINGS
	* * * * *
07/20/2016	APPELLEE'S BRIEF FILED. E/Res's Brief deadline satisfied. Reply Brief due on 08/08/2016 for Appellant Sergio Fernando Lagos. Paper Copies of Brief due on 08/01/2016 for Appellee United States of America. [16-20146] * * *.
	* * * * *
08/04/2016	APPELLANT'S REPLY BRIEF FILED. # of Copies Provided: 0. Reply Brief deadline satisfied. Paper Copies of Brief due on 08/10/2016 for Appellant Sergio Fernando Lagos. [16-20146] * * *.
	* * * * *
03/17/2017	UNPUBLISHED OPINION FILED. [16-20146 Affirmed] Judge: ECP, Judge: SAH. Mandate pull date is 04/07/2017 for Appellant Sergio Fernando Lagos [16-20146] (ACM)
03/17/2017	JUDGMENT ENTERED AND FILED. [16-20146] (ACM)
03/23/2017	REVISED PUBLISHED OPINION FILED. [8451032-2] [16-20146] (JRS)
	* * * * *

DATE	PROCEEDINGS
04/10/2017	MANDATE ISSUED. Mandate pull date satisfied. [16-20146] (SBS)

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

No. 4:13-cr-00554-1

UNITED STATES OF AMERICA, Plaintiff

v.

SERGIO FERNANDO LAGOS,
Defendant

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
08/27/2013	2	INDICTMENT (The original indictment with the signature of the grand jury foreperson is on file under seal with the clerk) as to Sergio Fernando Lagos (1) count(s) 1, 2-6, Aurelio "Jim" Aleman-Longoria (2) count(s) 1, 2-6, Oscar Cano Barbosa (3) count(s) 1, 2-6, filed. (sclement, 4) (Entered: 09/05/2013)
		* * * * *
01/20/2015	97	Minute Entry for proceedings held before Judge Kenneth M. Hoyt: RE-ARRAIGNMENT held on 1/20/2015. Sergio Fernando Lagos (1) Guilty Count 1, 2-6. Sentencing

DATE	NO.	PROCEEDINGS
		set for 4/13/2015 at 10:00 AM in Courtroom 11A before Judge Kenneth M. Hoyt. Appearances: Casey Nicole MacDonald, Dan Lamar Cogdell. (Court Reporter: K. Miller) Deft continued on bond, filed. (chorace) (Entered: 01/20/2015)
		* * * * *
03/09/2015	103	TRANSCRIPT as to Sergio Fernando Lagos re: Re-Arraignment held on January 20, 2015 before Judge Kenneth M. Hoyt. Court Reporter/Transcriber Kathleen K. Miller. Ordering Party Donean Surratt Release of Transcript Restriction set for 6/8/2015, filed. (kmiller,) (Entered: 03/09/2015)
		* * * * *
08/07/2015	124	Objection to Presentence Investigation Report (Sealed) by USA as to Sergio Fernando Lagos, filed. (Entered: 08/07/2015)
08/10/2015	126	Objection to Presentence Investigation Report (Sealed) by Sergio Fernando Lagos, filed. (Entered: 08/10/2015)
		* * * * *
10/26/2015	139	Objection to Presentence Investigation Report (Sealed) by USA as

DATE	NO.	PROCEEDINGS
		to Sergio Fernando Lagos, filed. (With attachments) (Entered: 10/26/2015)
10/28/2015	140	Sentencing Memorandum (Sealed) by Sergio Fernando Lagos, filed. (With attachments) (Entered: 10/28/2015)
		* * * * *
10/29/2015	147	Final Presentence Investigation Report (Sealed) as to Sergio Fernando Lagos, filed. (ticlark, 4) (Entered: 10/29/2015)
10/29/2015	148	Sealed Attachment to 147 Final Presentence Investigation Report (Sealed) as to Sergio Fernando Lagos, filed. (ticlark, 4) (Entered: 10/29/2015)
10/29/2015	149	Sealed Addendum to 147 Final Presentence Investigation Report (Sealed) as to Sergio Fernando Lagos, filed. (ticlark, 4) (Entered: 10/29/2015)
10/29/2015	150	Confidential Sentencing Recommendation (Sealed) regarding Sergio Fernando Lagos, filed. (ticlark, 4) (Entered: 10/29/2015)
		* * * * *

DATE	NO.	PROCEEDINGS
12/01/2015	156	Sealed Event, filed. (Entered: 12/01/2015)
12/02/2015	157	Revised Confidential Sentencing Recommendation (Sealed) regarding Sergio Fernando Lagos, filed. (njanice, 4) (Entered: 12/02/2015)
12/05/2015	159	Response to Objections to PSR (Sealed) by Sergio Fernando Lagos, filed. (Entered: 12/05/2015)
12/05/2015	160	Sentencing Memorandum (Sealed) by Sergio Fernando Lagos, filed. (With attachments) (Entered: 12/05/2015)
		* * * * *
12/06/2015	162	Sealed Event, filed. (Entered: 12/06/2015)
12/07/2015	163	Second Sealed Addendum to 147 Final Presentence Investigation Report (Sealed) as to Sergio Fernando Lagos, filed. (njanice, 4) (Entered: 12/07/2015)
12/07/2015	164	Revised Confidential Sentencing Recommendation (Sealed) regarding Sergio Fernando Lagos, filed. (njanice, 4) (Entered: 12/07/2015)
		* * * * *
01/06/2016	172	Opposed MOTION to Produce Memoranda of Interview Relevant

DATE	NO.	PROCEEDINGS
		to Sentencing by Sergio Fernando Lagos, filed. (Attachments: # 1 Proposed Order) (Cogdell, Dan) (Entered: 01/06/2016)
		* * * * *
01/22/2016	175	ORDER denying 172 Motion to Provide Copies of Memoranda of Interview Relevant to Sentencing as to Sergio Fernando Lagos (1). (Signed by Judge Kenneth M. Hoyt.) Parties notified. (chorace) (Entered: 01/22/2016)
01/27/2016	176	Objection to Presentence Investigation Report (Sealed) by USA as to Sergio Fernando Lagos, filed. (With attachments) (Entered: 01/27/2016)
01/31/2016	177	Sealed Event, filed. (Entered: 01/31/2016)
01/31/2016	178	Sealed Event, filed. (With attachments) (Entered: 01/31/2016)
02/01/2016	178	Agreed MOTION for Order of Restitution Payment by Sergio Fernando Lagos, filed. (Attachments: # 1 Proposed Order) (Cogdell, Dan) (Entered: 02/01/2016)
02/02/2016	180	Sealed Order, filed. (Entered: 02/02/2016)

DATE	NO.	PROCEEDINGS
02/04/2016	181	Sealed Event, filed. (With attachments) (Entered: 02/04/2016)
02/04/2016	182	ORDER of Restitution Payment granting 179 Agreed MOTION for Order of Restitution Payment as to Sergio Fernando Lagos (Signed by Judge Kenneth M. Hoyt) Parties notified. (arrivera, 4) (Entered: 02/04/2016)
02/04/2016	183	Third Revised Confidential Sentencing Recommendation (Sealed) regarding Sergio Fernando Lagos, filed. (skearns, 4) (Entered: 02/04/2016)
02/04/2016	184	Third Sealed Addendum to 147 Final Presentence Investigation Report (Sealed) as to Sergio Fernando Lagos, filed. (skearns, 4) (Entered: 02/04/2016)
02/09/2016	188	MOTION to Amend *Judgments Respecting Restitution Payee Information* by USA as to Sergio Fernando Lagos, Aurelio Jim Aleman-Longoria, Oscar Cano Barbosa, filed. (Attachments: # 1 Proposed Order) (MacDonald, Casey) (Entered: 02/09/2016)

* * * * *

DATE	NO.	PROCEEDINGS
02/09/2016	192	Minute Entry for proceedings held before Judge Kenneth M. Hoyt: Sentencing held on 2/8/2016 for Sergio Fernando Lagos (1), Count(s) 1, 97 months custody of the BOP as to each count to run concurrently; 3 yrs SRT with standard and mandatory conditions; Deft not to commit another local/state/federal crime; Deft not to poss firearms or destructive devices; DNA sample; Deft is prohibited from credit card access and must provide financial information to probation as requested; $100-SA as to each count for a total of $600 – due and payable immediately; Restitution totaling $15,970,517.37 owed to GE Capital to be paid not less than $1,000.00 a month commencing 60 days after release; No fine; Rulings as stated on the record; Appeal rights explained. Deft's request to surrender voluntarily is GRANTED. The deft is ORDERED to surrender to the United States Marshal Service on March 8, 2016, before the close of business in McAllen, Texas. The Court does not oppose any request by the deft to be housed as close as possible to McAllen, Texas, or at

DATE	NO.	PROCEEDINGS
		the Three Rivers facility and any appropriate programs. Appearances: U.S. Probation – H. Mejia, Dennis Hester. Casey Nicole MacDonald, Dan Lamar Cogdell. (Court Reporter: M. Malone) Deft continued on bond, filed. (chorace) (Entered: 02/09/2016)
02/11/2016	195	RESPONSE in Opposition by Sergio Fernando Lagos re 188 MOTION to Amend *Judgments Respecting Restitution Payee Information*, filed. (Cogdell, Dan) (Entered: 02/11/2016)
02/11/2016	199	ORDER granting 188 Motion to Amend as to Sergio Fernando Lagos (1), Aurelio Jim Aleman-Longoria (2), Oscar Cano Barbosa (3). (Signed by Judge Kenneth M. Hoyt.) Parties notified. (arrivera, 4) (Entered: 02/11/2016)
02/18/2016	202	JUDGMENT as to Sergio Fernando Lagos (Signed by Judge Kenneth M. Hoyt) Parties notified. (olindor, 4) (Entered: 02/18/2016)
02/18/2016	203	Statement of Reasons (Sealed) as to Sergio Fernando Lagos. NOTICE: Document available to applicable parties only. Authorized users en-

DATE	NO.	PROCEEDINGS
		ter CM/ECF Filer login and password first for authentication. Instructions available at http://www.txs.uscourts.gov/attorney-information – Electronic Access to Sealed Documents. Be sure to **SAVE** the document locally at the time of viewing, filed. (Entered: 02/18/2016)
02/22/2016	211	REPLY TO RESPONSE to Motion by USA as to Sergio Fernando Lagos re 188 MOTION to Amend *Judgments Respecting Restitution Payee Information*, filed. (Attachments: # 1 Exhibit 1, # 2 Errata 2) (MacDonald, Casey) (Entered: 02/22/2016)
02/29/2016	213	Unopposed MOTION to Continue Deadline to File Notice of Appeal by Sergio Fernando Lagos, filed. (Attachments: # 1 Proposed Order) (Cogdell, Dan) (Entered: 02/29/2016)
		* * * * *
03/01/2016	215	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit by Sergio Fernando Lagos as to Sergio Fernando Lagos (Filing fee $505, receipt number 0541-

DATE	NO.	PROCEEDINGS
		16256516.), filed. (Schaffer, Randolph) (Entered: 03/01/2016)
		* * * * *
03/03/2016	223	ORDER granting 213 Motion to Extend Time to File Notice of Appeal to April 2, 2016 as to Sergio Fernando Lagos (1). (Signed by Judge Kenneth M. Hoyt.) Parties notified. (chorace) (Entered: 03/03/2016)
		* * * * *
03/31/2016	231	APPEAL TRANSCRIPT as to Sergio Fernando Lagos re: Sentencing held on February 8, 2016 before Judge Kenneth M. Hoyt. Court Reporter/Transcriber Mayra Malone. Ordering Party Randy Schaffer. This transcript relates to the following: 217 Appeal Transcript Request. Release of Transcript Restriction set for 6/29/2016, filed. (mmalone,) (Entered: 03/31/2016)
		* * * * *

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal No. H-13-554 (1)

UNITED STATES OF AMERICA

v.

SERGIO FERNANDO LAGOS

Filed: October 26, 2015

GOVERNMENT'S MODIFIED OBJECTION TO THE PRESENTENCE INVESTIGATION REPORT, REQUEST FOR RESTITUTION AND RESPONSE TO THE DEFENDANT'S OBJECTION RESPECTING ROLE

COMES NOW, the United States of America, by and through Kenneth Magidson, United States Attorney, and Casey N. MacDonald, Assistant United States Attorney for the Southern District of Texas and files this Sealed Modified Objection to the Presentence Investigation Report (PSR) and Request for Restitution and Response to the Defendant's Objection to the PSR respecting role:

I. The Amount of Loss Should be Offset by Disposition of Collateral

U.S.S.G. § 2B1.1, cmt. n. 3E(ii) provides "in cases involving collateral pledged or otherwise provided by the

defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing. The defense objection to the PSR observes that this collateral section of the U.S.S.G. applies in this case. The Government agrees. The amount of loss should be offset by the amount recovered from the disposition of pledged collateral.

Based on the defendants' fraudulent scheme, GE Capital was induced to loan the defendants' company $35,000,000.00. This represents the intended loss caused in this case. However, the defendants' pledged collateral to obtain this line of credit. The financing agreement executed between the defendants and GE Capital provided that the loan was secured by collateral. The agreement defined "collateral" as "all present and future accounts; chattel paper, instruments; general intangibles; documents; all assets including, without limitation, inventory, equipment of every kind and description; furniture and fixtures; deposit accounts; money; investment property; letters of credit; notes; tax refund and insurance proceeds."

GE Capital recovered monies from the disposition of various collateral, detailed in the original victim impact statement (Attached as Government's Exhibit 1). After recovery of those monies, GE Capital was and is still owed $11,074,047.64, which represents the unsecured principal amount of the loan. This amount does not include interest nor does it include fees for attorney or other expenses. (See supplemental victim impact statement, attached as Government's Exhibit 2). Accordingly, the Government withdraws its previously filed objection

(D.E. 125) concerning the amount of loss and submits that the amount of loss for U.S.S.G. purposes is $11,074,047.64, warranting a 20 level increase under U.S.S.G. § 2B1.1(b)(1)(K).

II. Restitution

Restitution under the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, is a criminal penalty and a part of the defendant's sentence. *United States v. Adams*, 363 F.3d 363, 365 (5th Cir. 2004). The MVRA serves to reimburse victims of a crime for losses suffered that are caused by the defendant. The MVRA authorizes the district court to order restitution for victims of fraud offenses. 18 U.S.C. § 3663A(a)(1), (c)(1)(A)(ii). The statute provides that "the court shall order restitution to each victim in the full amount of each victim's loss as determined by the court" 18 U.S.C. § 3664(f)(1)(A). The Government bears the burden of proving loss to the victim by a preponderance of the evidence. 18 U.S.C. § 3664(6)(e). Under the MVRA, actual loss to the victim is used to calculate restitution. *See* 18 U.S.C. § 3664(f)(1)(A). Restitution is award to victims "directly and proximately harmed" as a result of a defendant's conduct. 18 U.S.C. § 3663A(a)(2). An award greater than the victim's actual losses exceeds the MRVA's statutory maximum. *United States v. Sharma*, 703 F.3d 318, 322 (5th Cir. 2012).

In addition to allowing the defendants to steal millions of dollars from GE Capital, the defendants' fraudulent scheme plunged USA Dry Van into bankruptcy. Consequently, the loss in this case includes the unpaid balance of the GE Capital's loan to the defendants and the monies GE Capital spent on attorneys fees who rep-

resented their interest in the bankruptcy actions. Because the bankruptcy actions were a direct and proximate cause of the defendants' fraudulent scheme, those costs are actual losses sustained by GE Capital. The total amount of actual loss to GE Capital is $11,862,945.52. This figure represents the unsecured balance of the unpaid loan, $11,074,047.64, and the attorney fees paid in connection with the bankruptcy proceedings: $1,039.50 to Foley & Mansfield and $787,858.38 to Jordan, Hyden, Womble, Culbreth & Holzer.

Further, 18 U.S.C. § 3663A(b)(4) provides that a victim will be reimbursed for any lost income or "other expenses incurred during participation in the investigation or prosecution of the offense." "Other expenses" include investigative audit expenses fees incurred by a victim in investigating the fraud. *United States v. Phillips*, 477 F.3d 215, 224 (5th Cir. 2007) (upholding district court's award for expenses incurred by University of Texas in investigating extent of defendant's data theft and expenses incurred in notifying victims) and *United States v. Herrera*, 606 Fed. Appx. 748, 752-53 (unpublished) (5th Cir. 2015) (upholding district court's restitution order that included investigative audit expenses of a CPA hired by the victim District prior to pursuing criminal charges under the MVRA as "other expenses incurred during participation in the investigation of the offense under 3663A(b)(4)," noting the duration and complexity of defendant's fraud); *see also United States v. Hosking*, 567 F.3d 329, 332 (7th Cir. 2009) (holding MVRA specifically contemplated inclusion of investigative expenses bank victim incurred in investigating complex embezzlement scheme in a restitution award finding that the bank's investigation led to the determination of the actual amount

embezzled); *See United States v. Amato*, 540 F.3d 153, 162 (2nd Cir. 2008) (finding that the victim corporation could get restitution for attorney fees and auditing costs that were necessary investigative expenses that ultimately led to the prosecution the defendants who committed a complicated fraud scheme).

In this case, GE Capital was required to spend an inordinate amount of resources investigating the extent of the defendants' fraud to determine the amount of actual loss. In order to preserve potential electronic evidence, it was necessary for GE Capital to hire Stroz Freidberg, a computer forensics company to forensically image hard drives and computer systems used by the defendants to effectuate their fraudulent schemes. The electronic data preserved contained records that allowed GE Capital to determine the actual amount of the defendant's fraud. The preservation of this data was ultimately vital to the later prosecution of the defendants. GE Capital also was required to retain Conway Del Genio (CDG) a consulting company to determine the extent of the loss and the defendants' company true financial condition.

A victim is also entitled to the reimbursement for attorneys fees incurred that were necessary in investigating or prosecuting the fraud. *See United States v. Dwyer*, 275 Fed. Appx. 269 (unpublished) (5th Cir. 2008) (finding no plain error in district court's inclusion of attorney fees incurred throughout investigation and prosecution); *United States v. Beaird*, 145 Fed. Appx. 853 (unpublished) (5th Cir. 2005) (finding no plain error in district court's order awarding victim attorney fees and litigation expenses); *Amato, supra*, 540 F.3d at 162. GE Capital paid $1,721,860.59 to Latham & Watkins and

$54,325.03 to Winston and Strawn, each of whom provided necessary counsel in connection with the fraud.

For those reasons, the Government requests that the Court order restitution in the amount of $15,970,517.37. As the below breakdown reflects, this amount constitutes the unsecured amount still owed on the loan, forensic fees, consulting fees and attorney fees incurred by G.E. Capital; it does not include interest on the loan:

a.	$ 11,074,047.64	(actual loss to victim: unsecured principal balance on loan)
b.	$ 787,897.88	(actual loss to victim: legal fees in bankruptcy proceedings)
c.	$ 20,092.32	(forensic expert fees in investigating fraud)
d.	$ 1,776,290.24	(legal fees in investigating fraud)
e.	$ 2,311,189.29	(consulting fees in investigating fraud)

III. Role: The defendant was a leader/organizer

A defendant's offense level is increased by four levels if he "was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." USSG § 3B1.1(a). "A 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted." USSG § 3B1.1, cmt. n.1. The defendant himself can be included in the number of participants. *See United States v. Cooper*, 274 F.3d 230, 247 (5th Cir. 2001).

To qualify for the adjustment, the defendant must have occupied an aggravating role as to at least one of the participants. USSG § 3B1.1, cmt. n.2. "In assessing

whether an organization is 'otherwise extensive,' all persons involved during the course of the entire offense are to be considered." USSG § 3B1.1, cmt. n.3. Some factors that distinguish a leader or organizer from a manager or supervisor (which would result in a three-level adjustment) include:

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

USSG § 3B1.1, cmt. n.4.

The PSR shows that the defendant was the leader and organizer of a complex fraudulent scheme. This defendant devised the scheme to defraud and instructed Barbosa as how to effectuate it. (PSR Paragraphs 19, 21, 24, 41) It cannot be reasonably argued that the ongoing, massive fraud in this case was not extensive.

In addition to the conduct of the three defendants, because the extent of the fraud was so great, it required virtually every employee in the accounting departments to execute it and to conceal it. At sentencing, the Government will adduce testimony from Special Agent Derick Lacina who conducted interviews of the following employees who assisted in executing and concealing the ongoing fraudulent scheme on a daily basis: 1) Julie Aleman, as a supervisor in the billing and collections department; 2) Venessa Montalvo, Controller for South Texas Petroleum (STP), a subsidiary corporation of Golagale

LLC; 3) Miriam Aranda, a billings and collections supervisor; 4) Laura Vasquez, a supervisor in the billing department; 5) Daisy Quintanilla, a billing clerk and 6) Rene Aguirre, a clerk in collections and billing. These employees had to create the false account receivables (A/R), they created customer codes to track the fake invoices, they created the corresponding false A/R entries could be entered into USADV electronic billing and accounting systems and they created fraudulent invoices and related supporting documentation to support false A/R entries to conceal the fraud from GE Capital, auditors and accountants.

Finally and most significantly, this defendant enjoyed the largest fruits of the fraud conspiracy. (PSR Paragraphs 36, 37, 38, 39) Consideration of the factors under U.S.S.G. § 3B1.1, cmt. n.4 establish that the defendant was no mere average participant. He was a leader and/or organizer. Accordingly, a four-level upward adjustment is warranted.

IV. Conclusion

WHEREFORE, PREMISES CONSIDERED, the Government requests that the Court grant the Government's Modified Objection to the Presentence Investigation Report and find that the intended loss in this case was $11,074,047.64. The Government requests that the Court enter an order of restitution in the amount of $15,970,517.37. The Government requests that the Court find that the defendant was a leader and an organizer warranting a four-level upward adjustment pursuant to U.S.S.G. § 3B1.1.

Respectfully submitted,

KENNETH MAGIDSON
United States Attorney

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Government's Objection to the Presentence Investigation Report was served to the Defendant's attorneys of record, Dan L. Cogdell and John A. Convery, Jr., and the U.S. Probation Office by e-mail, on this 26th day of October, 2015.

s/ Casey N. MacDonald
Casey N. MacDonald

Government Exhibit 1

VICTIM IMPACT STATEMENT

Victim: General Electric Capital Corporation
GE Capital
USAO Number: 2010R09670
Court Docket Number: 13-CR-00554

Insert the impact of the crime here (or, if a separate victim impact form is attached, please use that form to describe the impact of the crime):

General Electric Capital Corporation ("GE Captial")[1] is the owner and holder of certain promissory notes, account financing agreements, security agreements, financing statements, certificates of title and the related loan documents, as well as personal property lease agreements and related lease documents (the "Documents") made by the following companies: Logistics Carriers, LLC, USA Dry Van Logistics, LLC, USA Log. Carriers, LLC, USA Logistics Carriers, LLC, South Texas Petroleum, LLC, North American Trailer Rentals, LLC (collectively, the "Borrowers"). Aurelio Aleman, Sergio F. Lagos and Oscar Barbosa (collectively, the "Defendants") were officers of the Borrowers.

On or about January 15, 2010, GE Capital discovered that Defendants committed fraud, thereby harming GE Capital. On February 2, 2010, the Borrowers filed volun-

[1] As used herein, GE Capital includes certain affiliates, including Colonial Pacific Leasing Corporation.

tary Chapter 11 bankruptcy petitions in the U.S. Bankruptcy Court for the Southern District of Texas (the "First Bankruptcy Cases"). GE Capital filed proofs of claim in the Borrowers' First Bankruptcy Cases which asserted that, as of February 2, 2010, Borrowers owed GE Capital $41,509,369.12. GE Capital's debt was secured by liens on accounts receivable and various items of personal property used by Borrowers, including the equipment which was financed or leased pursuant to the Documents.

Consistent with orders entered by the bankruptcy court, GE made advanced to the Debtors during the bankruptcy case to enable the Debtors to continue operating during the First Bankruptcy Cases. The Borrowers' First Bankruptcy Cases were closed on December 28, 2010. At the time the Borrowers emerged from the First Bankruptcy Cases, GE Capital was owed approximately $45,782,216; this amount included a $500,000 substantial contribution claim awarded to GE Capital for its work in the First Bankruptcy Cases. Of the total amount owing to GE Capital when the Borrowers emerged from the First Bankruptcy Cases, $29,313,923 was secured by collateral.

Sometime after the First Bankruptcy Cases were closed, the Debtors decided to liquidate the business. On May 16, 2012 the Debtors engaged Raymond James to assist with the liquidation. Although GECC continued making advances during the liquidation, GECC also received proceeds as its collateral was liquidated. All such proceeds have been credited to the Borrowers' obligations and are reflected in the amount still owing as set forth in the amended proof of claim described below. On or about August 6, 2012, the Debtors sold their rolling

stock assets to Celadon. GECC received $4,543,000 from the disposition of the tractors and trailers it financed for the Debtors, most of which came from Celadon. GECC also received more than $9.2 million in account receivable collections after the sale to Celadon. Other significant credits include proceeds collected from settlements with a guarantor and with the Debtor's CPA firm. Finally, the amount owing also accounts for the proceeds received from the sale of certain real property located in Hidalgo County, Texas owned by Sergio Lagos, which was sold in September, 2010. The Borrowers filed their second voluntary bankruptcy petitions on October 28, 2013 (the "Second Bankruptcy Cases"). As of October 28, 2013, GE Capital was owed $16,656,136.57. GE Capital filed a proof of claim in the Second Bankruptcy Cases on August 4, 2014, asserting that, as of October 28, 2013, GE Capital was owed $11,760,666.84. This amount included principal and interest due with respect to the revolving debt and principal due from the term loan debt. This proof of claim **did not** include GE Capital's legal and forensic expert fees of $2,584,280.44, consulting fees in the amount of $2,311,189.29 or interest on the term debt. On June 17, 2015, GE Capital amended the proof of claim filed in the Second Bankruptcy Cases to include these legal and forensic expert and consulting fees setting forth the total amount in this paragraph. GE Capital's claim against the Borrowers is unsecured since all of the collateral securing the GE Capital debt was liquidated and proceeds applied to the debt prior to the filing of the Second Bankruptcy Cases.

Government Exhibit 2

VICTIM IMPACT STATEMENT

Victim: General Electric Capital Corporation
GE Capital
USAO Number: 2010R09670
Court Docket Number: 13-CR-00554

Insert the impact of the crime here (or, if a separate victim impact form is attached, please use that form to describe the impact of the crime):

General Electric Capital Corporation ("GE Capital")[1] submits this supplement to the Victim Impact Statement ("VIS") previously submitted in this case on July 1, 2015.

As set forth in the VIS, as of October 28, 2013, GE Capital was owed $16,656,136.57. This amount includes principal in the amount of $11,074,047.64, interest in the amount of $686,619.20, legal fees in the amount of $2,564,188.12, forensic expert fees in the amount of $20,092.32, and consulting fees in the amount of $2,311,189.29.

Given the magnitude and nature of Defendants' admitted fraud, GE Capital employed forensic experts to secure and preserve electronic data. In addition, GE Capital employed lawyers and consultants to investigate the extent of the fraud, provide legal advice in connection

[1] As used herein, GE Capital includes certain affiliates, including Colonial Pacific Leasing Corporation.

with its claims against the Borrowers and the Defendants, the bankruptcy proceedings, and to protect its rights and preserve its collateral.

GE Capital retained the following firms and consultants:

- Latham & Watkins (555 West Fifth Street, Los Angeles, CA): GE Capital retained Latham & Watkins to provide legal advice relating to Defendants' fraud and Borrower's likely bankruptcy filing. GE Capital worked specifically with Doug Bacon, Steve Tetro, Vik Puri and other professionals associated with the firm who provided GE Capital with the necessary counsel in connection with the fraud, the bankruptcy proceedings and the claims against the Borrowers. The total amount of fees paid to Latham & Watkins for their work was $1,721,860.59.

- Foley & Mansfield (250 Marquette Avenue, Minneapolis, MN 55401): GE Capital consulted Thomas Lallier of Foley & Mansfield on the likely bankruptcy filings by Borrowers. Mr. Lallier was the external counsel who originally drafted many of the documents between GE Capital and Borrower. GE Capital sought Mr. Lallier's legal advice on the enforceability of the loan documents against Borrowers, including but not limited to a review of the UCC filings and assistance with the anticipated bankruptcy filings. GE Capital paid Foley & Mansfield $1,039.50 in fees for their work on this matter.

- Jordan, Hyden, Womble, Culbreth & Holzer (500 North Shoreline, Corpus Christi, TX 78401): As part of the anticipated bankruptcy filing by Borrower and to assist GE Capital with issues locally, GE Capital retained the services of Shelby Jordan and others associated with the firm, Jordan, Hyden, Womble, Culbreth & Holzer to

represent GE Capital in court, including in the bankruptcy court, as well as to meet directly with the Borrower and Borrower's counsel locally and to assist with any local filings and proceedings, including the prosecution of claims against the Defendants and the other guarantor. GE Capital paid Jordan, Hyden, Womble, Culbreth & Holzer a total of $787,858.38 for their work on this matter.

- Winston & Strawn (36235 Treasury Center, Chicago, IL 60694-6200): GE Capital retained J. David Reich of Winston & Strawn's New York office to assist in the investigation of Defendants' fraud and to assess any potential claims or liability regarding the firm that audited Borrowers. Initially, Hannah Blumenstiel, who was associated with Winston & Strawn at the time was seconded to GE Capital and worked on the matter at no charge. At the end of her secondment, however, and upon her return to the law firm, GE Capital continued to call on her to provide legal advice in addition to Mr. Reich. GE Capital paid Winston & Strawn $54,325.03 for their work on the matter.

- Stroz Friedberg (32 Avenue of the Americas, 4th floor, New York, NY 10013): Stroz Friedberg is a computer forensics, investigations and electronic discovery technical services firm. GE Capital retained Stroz Friedberg's Dallas office shortly after the Defendants informed GE Capital that they had committed the fraud. At GE Capital's request and to ensure that none of Borrower's key electronic documents or systems were lost, Stroz Friedberg took forensic images of twelve hard drives for twelve custodians, forensically copied all of the exchange database files, made full back-ups of the MAS90

accounting system and the TMW Operating System, forensically copied the Accounts Payable and Billing systems and forensically copied all exchange database files. GE Capital paid Stroz Friedberg $20,092.32 for their work.

- Conway Del Genio ("CDG") was retained to assist in determining the Borrower's true financial condition, and to advise whether the Borrowers could survive as a going concern. CDG was paid $2,311,189.29.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Docket No. 4:13CR00554-001

UNITED STATES OF AMERICA

vs.

SERGIO FERNANDO LAGOS

Filed: October 29, 2015

PRESENTENCE INVESTIGATION REPORT

Prepared For: Honorable Kenneth M. Hoyt
United States District Judge

Prepared By: Hugo E. Mejia
United States Probation Officer
Houston, TX
* * *

Kimberly Vaults
United States Probation Officer
Houston, TX
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* * *

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(713) 567-9000

(210) 738-9060

Dan Lamar Cogdell
402 Main Street, 4th Floor
Houston, TX 77002
(713) 426-2244

Sentence Date: September 8, 2015, at 10:00 a.m.

Offense: Count 1: Conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 1349 and 1343. Not more than 20 years, not more than $250,000 fine, not more than 3 years of supervised release, mandatory restitution, and a $100 special assessment. (Class C Felony)

Count 2-6: Wire fraud, in violation of 18 U.S.C. § 1343. Not more than 20 years, not more than $250,000 fine, not more than 3 years of supervised release, mandatory restitution, and a $100 special assessment. (Class C Felonies)

Date Report Prepared: July 10, 2015

Date Report Revised:

Release Status: The defendant was arrested by immigration officials on September 4, 2013. The defendant was released on the same date under $50,000 unsecured bond, and placed on pretrial release supervision, in McAllen, Texas.

Detainers:	None.
Codefendants:	Aurelio "Jim" Aleman-Longoria 4:13CR00554-002
	Oscar Cano Barbosa 4:13CR00554-003
Related Cases:	SDTX 7:10CV00077

* * * * *

PART A. THE OFFENSE

Charges and Convictions

1. On August 27, 2013, a six-count Criminal Indictment was filed in the United States District Court for the Southern District of Texas, Houston Division, naming **Sergio Fernando Lagos**, Aurelio "Jim" Aleman-Longoria and Oscar Cano Barbosa, as the defendants. Count 1 charged all defendants with conspiracy to commit wire fraud beginning in or around March 2008 and continuing until at least January 31, 2010. Counts 2 through 6 charged all defendants with wire fraud on September 8, 2008 (Count 2), September 2, 2009 (Count 3), October 2, 2009 (Count 4), November 2, 2009 (Count 5), and November 2, 2009 (Count 6).

2. The Indictment notifies all defendants that upon conviction, a money judgment may be imposed equal to the total value of property subject to forfeiture, for which the defendant may be jointly and severally liable. That amount is estimated to be, but is not limited to, approximately $26,254,781.

3. On January 20, 2015, **Sergio Fernando Lagos** appeared with counsel for rearraignment before United States District Judge Kenneth M. Hoyt, and entered a plea of guilty as to Counts 1 through 6 of the Criminal Indictment, without a plea agreement. The Court accepted the defendant's guilty plea and a Presentence Report was ordered. Sentencing was deferred to a later date and the defendant was continued on bond.

4. According to the U.S. Pretrial Services officer, the defendant is in full compliance with all conditions.

The Offense Conduct

5. Information for this section was obtained through the investigative file material of the United States Attorney's Office, Immigration and Customs Enforcement (ICE), Homeland Security Investigations (HIS), the Federal Bureau of Investigation (FBI) and General Electric Capital Corporation (GECC). The assigned case agents were also contacted regarding this case.

Background

6. USA Dry Van Logistics LLC (USADV) was a trucking company, specializing in cross-border trucking servicing the maquiladora industry.[1] The USADV corporate headquarters were located in McAllen, Texas. USADV was a subsidiary of Golagale Holdings, LLC, and Affiliate (Golagale Holdings). There

[1] The maquiladora industry involves the shipment of goods, products or materials into Mexico, on a duty-free or tariff-free basis, where the goods are assembled or manufactured by Mexican factories before being exported back to the United States for end use or sale.

were other operating subsidiaries of Golagale Holdings including U.S.A. Logistic Carriers, LLC, and USA Log Carriers, LLC.

7. **Sergio Fernando Lagos** was the owner, Chief Executive Officer and a member of the Board of Directors of Golagale Holdings, LLC.

8. Aurelio "Jim" Aleman-Longoria was an owner, Chief Operations Officer and a member of the Board of Directors of Golagale Holdings, LLC.

9. Oscar Cano Barbosa was the Controller for Golagale Holdings, LLC and USADV.

10. General Electric Capital Corporation (GECC) was a non-bank lending corporation that provided capital to businesses. GECC was a Delaware company with its principal place of business in Norwalk, Connecticut.

11. Aleman-Longoria and **Lagos** entered into a Revolving Loan financing agreement on behalf of USADV with GECC, under which GECC would issue revolving line of credit which was secured by USADV's accounts receivable. The financing agreement required the borrowers to use all proceeds of the Revolving Loan for business purposes and to promptly notify GECC of any material change in the business or financial affairs of the Borrowers.

12. The maximum amount that could be borrowed under the financing agreement varied and was calculated using a formula based on the Borrower's "eligible" accounts receivable. Eligible accounts receivable were those not more than ninety (90) days old. The financing agreement required that all accounts

receivable were and would be bona fide, legal and existing obligations created by the rendition of services actually rendered. The financing agreement provided that the maximum amount that the Borrowers could borrow under the Revolving Loan in any given month was the sum of a percent of the Borrowers' eligible accounts receivable.

13. Pursuant to the Agreement, USADV justified advances on the line of credit by submitting "Borrowing Base Certificates" (BBCs) to GECC. BBCs had to be certified as true, complete and accurate by an officer of USADV. GECC relied on the BBCs to determine the amount that USADV could borrow at any given time.

14. The Agreement also required the Borrowers to maintain a standard system of accounting in accordance with generally accepted accounting principles in the United States and, on a quarterly and/ or annual basis, to provide consolidated balance sheets, statements of profits and loss reflecting the financial condition of the Borrowers and its affiliates and statements of assets and liabilities of each Guarantor, accompanied by a certificate signed by the Borrowers' president and treasurer certifying that each officer had received the provision of the Agreement and stating that the Borrowers have not been in default as to any provisions contained in the Agreement.

15. The Agreement also required the Borrowers to use all the proceeds of the Revolving Loan for business purposes and to promptly notify GECC of any material change in the business or financial affairs of the Borrowers.

16. In May 2003, USADV obtained a line of credit from GECC for approximately two to three million dollars. This line of credit eventually increased to $35,000,000 by October 27, 2009. By December 31, 2009, USADV had borrowed $28,892,896.94, of the $35,000,000, that they were eligible to borrow. USADV pledged their accounts receivables[2] as collateral to obtain this line of credit. During this time period, in order to receive additional money from the line of credit, USADV was required to submit a document called a Borrowing Base Certificate (BBC) to GECC. USADV was eligible to request up to the lesser amount of $35,000,000 or 85% of their eligible accounts receivable for a specific time period which would qualify them for additional funds.

17. Beginning in or around March 2008, and continuing until at least January 31, 2010, Barbosa, Aleman-Longoria and **Lagos** conspired to defraud and obtain money from GECC by means of materially false and fraudulent pretenses, representations and promises. The object of the conspiracy was to mislead GECC about the true value of the Borrower's accounts receivable so that the Borrowers could continue to receive a line of credit from GECC and induce GECC to increase the maximum amount of the Revolving Loan, thereby, providing uncollateralized funds to the Borrowers. Barbosa, **Lagos** and Aleman deliberately and falsely overstated and caused to be overstated the accounts receivable on

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[2] Accounts receivables are monies owed to a business by to its customers typically generated through sales. USADV was eligible to receive a loan up to 85% of their total eligible accounts receivable balance with a limit of $35,000,000 as of October 27, 2009.

the BBCs and the consolidated financial statements that were electronically supplied to GECC. At their direction, the accounts receivable were successfully, deliberately and falsely overstated by: booking fictitious sales, thereby creating fictitious accounts receivable; using the fictitious accounts receivable as collateral to obtain additional loan funds from GECC; transferring by interstate wire transfer, funds received from GECC which had been deposited into the USADV bank account at Hibernia National Bank in Texarkana, Texas; to the Lockbox[3] account at Harris Trust and Savings Bank in Chicago, Illinois, in order to disguise the payments as customer payments; applying said payments to the fictitious customer accounts to give the false appearance to GECC that the fictitious accounts receivable were entirely legitimate and being collected from genuine customers; and "re-aging"[4] the accounts receivable by issuing credits for historical sales invoices, then rebooting the sales so that they appeared to have been incurred more recently, and were thus more valuable and "eligible" for use as collateral.

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[3] The Revolving Loan Agreement required that USADV use a Lockbox account set up for the Accounts Receivable under the control of GECC (Corporate Checking Account with Harris N.A. Bank in Chicago, Illinois Account.)

[4] Re-aging of accounts receivable occurred at USADV when a credit was issued for an old sale invoice and the same invoice was re-invoiced with a new date and invoice number so that it was more current, thus permitting accounts receivable that were otherwise older than 90 days to be falsely counted as eligible accounts receivable.

18. In March 2008, USADV began implementing a scheme where they would fraudulently increase their accounts receivable balance which would allow them to illegally obtain additional funds from the line of credit. On December 31, 2012, it was estimated that approximately $10,540,188.75, of the $37 266,037.49, accounts receivable on USADV books were legitimate. USADV obtained the majority of the line of credit based on this approximately $26,725,787.71, of fraudulent account receivables that never existed.

The Conspiracy

19. Beginning in 2008, USADV began having cash flow issues. **Lagos** had a meeting with Aleman-Longoria and Barbosa and during the meeting, **Lagos** discussed the scheme that he devised, where USADV would fraudulently increase their accounts receivables for the purpose of requesting additional money from the line of credit obtained from GECC. **Lagos** instructed Barbosa to assist in the implementation of the fraudulent scheme. **Lagos** also tasked Barbosa with involving other USADV accounting personnel, which included Julie Aleman (Aurelia Aleman's daughter).

20. In order to carry-out the fraudulent scheme, USADV figured out a way that they could disconnect their Transportation Dispatch System (TMW), which kept track of all of their legitimate sales from their accounting software (MAS). Once they disconnected the two systems, they could manually post fraudulent sales to the MAS system. By creating false sales, this would artificially inflate their accounts receivable account balance. USADV would

then report the fraudulent increase in accounts receivables on the BBC's which were in turn submitted to GECC. GECC would then loan USADV up to 85% of their eligible accounts receivables which consisted of the fraudulent accounts.

21. USADV created fraudulent invoices using existing customers and also used "customers" that USADV had not done business with. **Lagos** devised the idea to put an "S" in front of all of the fraudulent invoices in order to track them. USADV kept one register for the legitimate accounts receivables and a separate register for the fraudulent accounts receivables. In an effort to conceal the fraud, each time USADV was audited, the staff would create false paper invoices for all of the fraudulent invoices that the auditors would sample. Whenever the auditor would request these fraudulent "S" invoices, Barbosa would delay the auditors so that he could provide the invoices the following day which would give the staff time to create fictitious invoices. On the night before the invoices were due, Barbosa and the accounting staff would stay late and create these fake "S" invoices. The accounting staff would also locate legitimate proof of delivery documents with dates in close proximity to the date of the fictitious invoices. They would then provide this legitimate proof of delivery documents along with the fictitious invoices to the auditors the following day in order to conceal the fraud.

22. Each time fraudulent "S" invoices would reach past due status, USADV employees would either wire funds from their operating account to a lockbox to disguise the payments as customer payments and

apply those payments to the fake customer accounts; or they would delete the old fraudulent invoices from the system and create a new fraudulent invoices for the same amount with a newer date.

23. Throughout the scheme, Barbosa sent emails to **Lagos** and Aleman-Longoria detailing the amount of fraudulent borrowing. According to Aleman-Longoria, Barbosa also sent emails to he (Aleman-Longoria) and **Lagos** telling them to stop spending so much money.

24. **Lagos** would determine the shortfall in their operating account and then instruct Barbosa on the amount of additional false invoices that would need to be created in order to obtain additional funds. Barbosa would then instruct and assist the accounting department on how many false invoices to create. It is noted that the accounting staff were all aware of the fraud they were committing.

25. Aleman-Longoria admitted to investigators that he was aware that the money he was spending was obtained through fraudulent activity and he took full responsibility for his actions.

26. GECC hired the Jabez Group to perform field exams[5] which were scheduled for every six months. During these field exams, the Jabez Group would request backup documentation, including sales invoices to support their accounts receivable. Whenever the Jabez Group would unknowingly request false invoices to sample, employees of USADV

[5] Process taken in order to appraise the value of a company's assets.

would create fraudulent invoices and provide these invoices to the Jabez Group. USADV was able to prevent the Jabez Group from detecting the fraudulent activity that they were conducting.

27. **Lagos** and Aleman-Longoria took large distributions from USADV which largely consisted of the money from the fraudulent scheme. In order to disguise these distributions from the auditors and refrain from reporting these distributions on their financial statements they devised another scheme. Towards the end of the year, they would transfer money that was fraudulently obtained from GECC into Certificates of Deposit (CDs). They would then obtain personal loans using the money in those CDs as collateral. Then, they would use the proceeds from the personal loans to pay back the distributions that they had taken during the year. The following year, they would then use the money in the CD accounts, which was fraudulently obtained to pay off the personal loans in their names.

28. **Lagos** admitted to investigators to double and triple financing a large volume of GPS and Power Units to two to three separate lenders. None of the lenders were aware that the assets were being used as collateral to obtain separate loans. Many of these lenders incurred substantial losses due to this fraudulent financing of assets.

29. In 2009, USADV could no longer make both principle and interest payments on their line of credit. USADV then negotiated the terms of the line of credit to include making interest only payments.

30. Burton, McCumber & Cortes, LLP (BMC), had performed the audit for Golgale Holdings and their subsidiary companies since 2004. The audit for 2008 was much later than normal as Barbosa told BMC that Golgale was not yet ready for the audit. In August 2009, Ben Pena, audit manager for BMC, received the financial documents of Golgale and began their preparation to conduct the audit. BMC required USADV employees, including **Lagos**, Aleman-Longoria and Barbosa to execute "Fraud Questionnaires for Management." **Lagos**, Aleman-Longoria and Barbosa always disclaimed any knowledge of any fraud, falsely certifying on every questionnaire that they had no knowledge of actual fraud and no reason to believe that fraud was otherwise occurring.

31. **Lagos**, Aleman-Longoria and Barbosa had a meeting with their independent auditor, who informed them that they would be sending confirmation letters to USADV customers to confirm accounts receivable balances.

32. On October 27, 2009, **Lagos** and Aleman-Longoria signed Amendment Twelve of the Revolving Loan Agreement on behalf of the Borrowers inducing GECC to increase the amount of the Revolving Loan to the lesser amount of $35,000,000 or 85% of eligible accounts receivable.

33. USADV also employed the consulting services of Curt Friedberg to assess in their financial issues. While Friedberg was at USADV, the owners admitted to the fraud that they had committed.

34. On January 25, 2010, Aleman-Longoria, **Lagos** and Friedberg had a meeting with GECC employees and various other individuals. During this meeting, Friedberg explained the fraudulent scheme that occurred at USADV. Aleman-Longoria and **Lagos** finally admitted to GE Capital the fraudulent activity including the overstatement of accounts receivables; which was later verified by GECC along with outside consultants. **Lagos** and Aleman-Longoria stated that the reason they committed the fraud was in order to pay for the buyout of George Gomez,[6] rising fuel costs and also to pay for their extravagant spending habits.

35. Aleman-Longoria admitted to investigators that even after the fraud had been discovered, he cashed a USADV dividend check from the Loves Gas Station for approximately $18,000-$20,000, in order to pay for his daughter's wedding.

36. On February 2, 2010, USADV including its parent company declared bankruptcy. On February 3, 2010, **Lagos** withdrew approximately $251,000 from his savings account at Highway District 21 Federal Credit Union, which he never turned over during the USADV bankruptcy proceedings. Two checks were issued to **Lagos** on this date, one in the amount of $40,000 and another in the amount of $211,000; to-

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[6] George Gomez served as the sole investor and provided $1.2 million for the establishment of USADV. In January 2008, Gomez approached Lagos about being kept in the dark about business decisions with USADV. Gomez wanted out of the business and agreed to sell his interest for $1.9 million and a 19 acre piece of land. Gomez officially left the company in March 2008.

taling $251,000. This money originated from six surrendered Certificates of Deposit accounts at the Highway District 21 Federal Credit Union. Five of these six Certificate of Deposit Accounts, which had a total purchase price of $230,586.35, were not purchased with **Lagos'** personal funds, but purchased with funds belonging to USA Carriers or its related companies.

37. From Spring 2009 through Spring 2010, **Lagos** received approximately $4.3M and Aleman-Longoria received approximately $2.5M.

38. On February 4, 2010, **Lagos** deposited two cashier's checks into his personal checking account at Texas Community Bank, at the Highway District 21 Federal Credit Union. One in the amount of $211,000 and another check in the amount of $40,000 ($30,000 of this amount was withdrawn as cash). On the same date, **Lagos** wrote a check in the amount of $75,000 from his Texas Community Bank account and made it payable to Hasdorff & Covery for attorney fees.

39. On February 11, 2010, **Lagos** wrote a check payable to cash in the amount of $95,000. On February 16, 2010, **Lagos** wrote a check payable to cash in the amount of $45,000.

Docket No. 7:10CV00077

40. On March 16, 2010, a civil complaint was filed by GECC against **Lagos** and Aleman-Longoria in the Southern District of Texas, McAllen Division, after they defaulted on the repayment, performance and terms of the loans advanced to USADV (**Lagos** and Aleman-Longoria agreed to personally guarantee

the debt of USADV and other subsidiary corporations of Golagale LLC). The case was assigned to Judge Hinojosa and was resolved by way of an Agreed Judgment which was entered as a final judgment on August 16, 2010. GECC obtained a final, non-appealable, Agreed Judgment against both **Lagos** and Aleman-Longoria for the principal amount of $33,555,506, excluding interest and which was set at a non-default rate of 7% per year. To date, GECC has only received $580,000, which came from the sale of **Lagos'** home.

Relevant Conduct Assessment

41. **Sergio Fernando Lagos** was an owner and Chief Executive Officer of USA Dry Van Logistics LLC (USADV), a subsidiary of Golagale Holdings, LLC. **Lagos** also with Aleman-Longoria entered into a Revolving Loan financing agreement on behalf of USADV with General Electric Capital Corporation (GECC). A line of credit was issued by GECC that was secured by USADV's accounts receivable. USADV began having cash flow issues, at which time, **Lagos** called a meeting with Aleman-Longoria and Barbosa and devised a scheme wherein USADV would fraudulently increase their accounts receivable for the purpose of requesting additional money from the line of credit obtained from GECC. USADV would keep one register for their legitimate accounts receivables and a separate register for their fraudulent accounts receivable. **Lagos** instructed Barbosa to assist in the implementation of the fraudulent scheme and also that he involve other USADV accounting personnel. **Lagos** instructed the accounting staff to put an "S" in front of all of

the fraudulent invoices so that they would keep track of them. Barbosa would often times delay the auditors by one day in order to give the account staff time to prepare the false invoices. **Lagos** instructed Barbosa to assist in the implementation of the fraudulent scheme and also that he involve other USADV accounting personnel. During the scheme, **Lagos** would determine the shortfall in their operating account and then instruct Barbosa on the amount of additional false invoices that would need to be created to obtain additional funds. Barbosa would then instruct and assist the accounting department on how many false invoices to create. The accounting staff was all aware of the fraud they were committing. As a result of the fraudulent scheme, GECC incurred a loss of $26,254,781. **Lagos** is deemed an organizer within the conspiracy.

Victim Impact

42. Pursuant to the Mandatory Victims Restitution Act of 1996, the total restitution amount identified is $26,254,781, due and payable to General Electric Capital Corporation (GECC). However, according to GECC, through the course of bankruptcy acquisitions, as of October 28, 2013, the amount owed GECC was $11,760,666.84.

Legal Department

GE Capital – Transportation Finance

1010 Thomas Edison Blvd. SW

Cedar Rapids, Iowa 52404-8247

43. GECC has provided a Victim Impact Statement. (see attachment)

Adjustment for Obstruction of Justice

44. The probation officer has no information to suggest that the defendant impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

45. During the presentence interview, the defendant stated he would provide a written statement at a later date, regarding his involvement in the offense. As of the time of this writing, no statement has been received. However, it is noted that the defendant pled guilty to the offense.

Offense Level Computation

46. In light of the Supreme Court opinion in United States v. Booker, 125 S.Ct. 738 (2005), the federal Sentencing Guidelines are advisory. According to Booker, while not bound by the Guidelines, the Court must consult the Guidelines and take them into account when sentencing.

47. Due to the multiple counts of conviction, the grouping rules contained in U.S.S.G., Chapter Three, part D, are applicable. Counts involving substantially the same harm shall be grouped together into a single group. All counts are grouped pursuant to U.S.S.G. § 3D1.2(d), since the offense level is determined largely on the basis of an aggregate measure of harm, loss or substance or is ongoing or continuous in nature and the offense guidelines is written to cover such behavior. Due to the operation of U.S.S.G. § 1B1.3, the counts result in identical offense levels; therefore, Count 2 will be used to portray the guideline computations set forth below.

48. The 2014 edition of the Guidelines Manual has been used in this case.

Count 2 – Wire fraud.

49. **Base Offense Level:** The United States Sentencing Commission Guideline for violation of 18 U.S.C. § 1343 is founded in U.S.S.G. § 2B1.1 and calls for a base offense level of 7. +7

50. **Specific Offense Characteristic:** Since the loss of $26,254,781, exceeded $20,000,000, but was less than $50,000,000, the offense level is increased by 22 levels pursuant to U.S.S.G. § 2B1.1(b)(1)(L). 22

51. The offense involved the use of sophisticated means; and therefore, pursuant to U.S.S.G. § 2B1.1(b)(10)(C), the offense level is increased by 2. +2

52. **Victim Related Adjustments:**

53. **Adjustments for Role in the Offense:** Pursuant to U.S.S.G. § 3B1.1(a), the offense level is increased by four, as the defendant is deemed an organizer/leader or criminal activity that involved five or more participants or was otherwise extensive. +4

54. **Adjustments for Obstruction of Justice:** None. 0

55. **Adjustment Offense Level (Subtotal):** 35

56. **Adjustment for Acceptance of Responsibility:** None. 0

57. **Total Offense Level:** 35

58. **Chapter Four Enhancements:** None. 0

59. **Total Offense Level:** 35

Offense Behavior Not part of Relevant Conduct

Activity After Initial Bankruptcy

60. On October 5, 2010, North American Xpress Carriers, LLC, was incorporated in the State of Texas and Frank Flores was listed as the sole owner of the corporation. Flores is **Lagos'** ex-brother-in-law. On January 20, 2011, North American Xpress Carriers, LLC, changed its name to Americorp Xpress Carriers LLC.

61. A bank teller for First National Bank stated that towards the end of 2010, Frank Flores began making a large amount of structured cash deposits just under $10,000. Frank Flores told the bank teller that he was depositing the cash under the Currency Transaction Report threshold (CTR), with the intention of avoiding CTRs being filed on him. Frank Flores also stated that he was obtaining the money from his ex-brother-in-law, Sergio **Lagos**, who was his business partner. The bank teller recalls meeting **Lagos** when he came into the bank to inquire about purchasing a repossessed home. The bank teller stated that Frank Flores was transferring the money to Texas Community Bank in order to obtain a line of credit for the new trucking business. Frank Flores told the teller that he could get a better rate with another bank and which is why he did not use First National Bank.

62. The bank teller stated that in 2011 Flores, deposited a little under $100,000 of cash into his account. The teller stated that the cash was in straps and stamped by JPMorgan Chase Bank. Frank Flores told the bank teller that he obtained the money from the sale

of scraped steel and that he received a check that was written from an account at JPMorgan Chase Bank. Flores stated he cashed the check at JPMorgan Chase Bank and did not have any issues with the check bouncing. Once Flores cashed the check, he brought the cash over to First National Bank to be deposited.

63. Below are a sample cash deposits that were made into Frank Flores Account # 34001433 at First National Bank between October 7, 2010 and February 15, 2011:

Date			Amount
October 7, 2010	Cash In	Deposit	$9,900.00
October 8, 2010	Cash In	Deposit	$9,900.00
October 12, 2010	Cash In	Deposit	$9,900.00
October 13, 2010	Cash In	Deposit	$9,900.00
October 18, 2010	Cash In	Deposit	$9,900.00
December 17, 2010	Cash In	Deposit	$9,900.00
December 22, 2010	Cash In	Deposit	$9,900.00
December 23, 2010	Cash In	Deposit	$9,900.00
December 24, 2010	Cash In	Deposit	$9,900.00
December 28, 2010	Cash In	Deposit	$9,900.00
December 29, 2010	Cash In	Deposit	$9,800.00
December 30, 2010	Cash In	Deposit	$9,800.00
January 3, 2011	Cash In	Deposit	$9,900.00
January 4, 2011	Cash In	Deposit	$9,700.00
January 5, 2011	Cash In	Deposit	$9,800.00
January 6, 2011	Cash In	Deposit	$3,300.00
January 31, 2011	Cash In	Deposit	$8,550.00
February 15, 2011	Cash In	Deposit	$93,156.00
Total			**$262,906.00**

64. Leticia Rodriguez, who has been dating Frank Flores on and off since 2002, stated that approximately two years ago, Flores and **Lagos** started up Americorp Xpress Carriers, LLC.

65. Rodriguez stated that towards the end of 2010 or the beginning of 2011, **Lagos** contacted Frank Flores via the phone and inquired as to whether or not he was interested in starting up a trucking company with him. She stated that Frank Flores agreed to do so.

66. Rodriguez stated that **Lagos** had approximately five to seven Rolex watches which he wanted to sell in order to obtain his portion of the startup money for the new trucking company. Rodriguez stated that she had a friend by the name of John Van Ramshorst who was interested in purchasing the watches. She stated that she brought the watches to her job at Edwards Abstract and John Van Ramshorst had an appraiser meet her there to appraise the watches. She stated that several days later, John Van Ramshorst purchased the watches for approximately $120,000 in cash. She stated that John Van Ramshorst brought the cash to her job at Edwards Abstract and she exchanged the watches for the cash outside the building. Rodriguez stated that Frank Flores shortly thereafter picked up the money at her job and she believes he took it straight to the bank. She stated that this money was used to start up the trucking company. Rodriguez stated that John Van Ramshorst recently passed away at the age of eighty two and she believes his family has the watches.

67. Rodriguez stated that Flores obtained his share of the money to start up the trucking company from a bank loan.

68. Rodriguez stated that **Lagos** and Frank Flores used the money from the watches and the loan to purchase approximately 10 tractors to start up the business. Rodriguez stated that **Lagos'** first wife did not provide any money to start up the trucking company.

69. Agents interviewed Alma Van Ramshorst, who was the surviving spouse of John Van Ramshorst regarding the whereabouts of the Rolex watches that were possibly purchased by her late husband. Agents subsequently received a call from John Lopez who was calling on behalf of Alma Van Ramshorst. Lopez stated that Alma Van Ramshorst had several watches that her husband purchased which consisted of three Rolex watches and two Breitling watches. Agents physically verified the existence of these watches and took pictures of the watches. A description of these watches is listed below:

Brietling K13356 Chronographe Certifie Chronometre Automatic N 0638, 2539147

Breitling for Bentley Motors, Edition Limitte a 50 Exemplaires 5 of 50, 30 Second Chronograph, 5/50, H25363, 2126767

Rolex – (Platinum) 18946/D810823, 3155, 1296999

Rolex – (Blue Face) 118238/D403843 3155, 3 9783471

Rolex – (Gold) 18948/Z395058, 72748 Band 18kt, Mumt 3155, 1550094

70. Further investigation by agents revealed that **Lagos** purchased two of the above watches from Tourneau – Las Vegas, 3500 Las Vegas Blvd. #F07, Las Vegas, NV 89109. On August 8, 2007, **Lagos** purchased the above Breitling for Bentley Motors, Edition Limitte a 50 Exemplaires 5 of 50 for $100,207.50. On September 11, 2007, **Lagos** purchased the above Rolex – (Platinum) 18946/D810823 for $74,700.00.

71. Ivonne Gallur, who is **Lagos'** second ex-wife, stated that while **Lagos** was an owner at USADV, he purchased assets in Mexico, including trailers which were put under other individuals' names. Some assets were purchased under Barbosa's name in the United States. Gallur stated that **Lagos** would always put assets in other individual's names.

72. Gallur was told by **Lagos** that he owned a trucking company that was not in his name, but rather under Frank Flores' name. The trucking company had approximately 120 trucks and approximately 300 trailers. She further stated that **Lagos** told her that he did not want to put any property under his name due to the fact that it would be taken away from him. Gallur stated that **Lagos** has a ranch that belonged to him; however, it was in an unknown person's name. She further stated that **Lagos** was going to build a residence on this property once all of his legal issues were done.

73. Gallur stated that **Lagos** lent his brother, Pedro **Lagos**, approximately $50,000 from his new trucking company.

74. Gallur stated that **Lagos** owns two Harley Davidson motorcycles that were kept at the new trucking company's location. She also stated that **Lagos** also had a Mercedes however; it was not under his name.

75. Gallur provided agents with a recorded conversation in which she stated that **Lagos** told her that Americorp Xpress Carriers actually belongs to him; however, it was in Frank Flores' name.

76. Noe Garcia, an accountant for Americorp Xpress Carriers and former accountant for USADV stated that Norma Flores (an ex-wife of **Lagos**) provided a $100,000 loan to start Americorp Xpress Carriers and William Horine provided another $100,000 loan to start the business. Garcia further stated that Frank Flores did not use any of his personal money to start up the business. Garcia stated that he knew that Frank Flores sold the vehicles in his salvage yard but did not believe any of this money was used to start up Americorp Xpress Carriers. Garcia stated that the loan from Norma Flores was paid back in March of 2012 and that Norma Flores lent Americorp another $100,000 in July or August of 2012 which has also been repaid.

77. Garcia stated that **Lagos** was a current employee of Americorp Xpress Carriers, however he went on to state that **Lagos** is in charge of the operations of Americorp Xpress Carriers and also makes the financial decisions for the company. He stated **Lagos** is being paid $500 a week and has only begun to receive that salary starting in October. Garcia was asked if **Lagos** receives any other salary or distribution from Americorp Xpress Carriers. Garcia

then stated that Frank Flores receives a management fee of $3,500, a week and that **Lagos** receives an unknown portion of that management fee. Garcia further stated that **Lagos** drives a S500 Mercedes Benz that is under Norma Flores' name and that Norma Flores pays bills for **Lagos**. Garcia stated that **Lagos'** brother pays for his apartment that he is renting.

78. During an interview, **Lagos** stated that he was an employee of Americorp Xpress Carriers and assisted in starting up the company. He stated that his ex-wife, Norma Flores lent Frank Flores $100,000 to start up the company and Frank Flores used $450,000 of his own money to start up the company.

79. Frank Flores was interviewed and stated that he began Americorp Xpress Carriers LLC, in the later part of 2010. He further stated that he purchased six trucks in October of 2010 and another six trucks in January of 2011 for approximately $25,700 each.

80. Frank Flores stated that he started up Americorp Xpress Carriers, LLC, with the help of Sergio **Lagos** who was hired as a consultant. He stated that **Lagos** had no ownership in the company and was only paid $500 a week in cash. Frank Flores further stated that **Lagos** has never contributed any money to the company and has no financial control over the company.

81. Frank Flores stated that the trucking company was started up using $100,000 of his personal money and $50,000 from his sister, Norma Flores.

82. Frank Flores was asked if he ever deposited large amounts of cash into his bank accounts and he stated

that he only once deposited cash into his bank account. Frank Flores was asked several times if he ever deposited just under $10,000 to avoid the filing Currency Transaction Reports, and he replied that he never did. Frank Flores stated that the only time that he ever deposited a large amount of cash into his bank account was when he sold all of the vehicles he had in his salvage yard. He stated that he was paid in cash when he sold the vehicles for scrap. He was questioned as to whether he may have been paid with a check for the scrap metal instead of cash and Frank Flores insisted that he was paid in cash and then deposited into the bank. Frank Flores further stated that he was paid $300 per ton for the scrap metal and then deposited this cash into his bank account.

83. Frank Flores stated that **Lagos** has no financial control over Americorp Xpress Carriers.

84. Norma Flores was interviewed and stated that she divorced **Lagos** in 2004, however; they actually separated in 2003. Norma Flores was asked what assets she owned once her divorce was finalized and she stated that she only owned two vehicles (a 2002 Cadillac and a 2003 Chevrolet Tahoe), a residence located at 2917 Las Cruces Drive, Edinburg, Texas; a $6,000 in a retirement account from the City of McAllen and she had been awarded the Rapid Tax Service business from **Lagos**. Norma Flores further stated that she was awarded approximately $3,700 a month in alimony and $1,800 in child support.

85. Norma Flores was asked if **Lagos** owed her any money in alimony or child support and she stated

that he owed her approximately $30,000 - $40,000 in alimony and approximately $20,000 in child support.

86. Agents asked Norma Flores what the balance was on her mortgage when she got divorced and she was unsure. However, she stated that the house was purchased in 1997 or 1998 for approximately $120,000 and only monthly payments were made on the mortgage. There was also no additional principle payments made on the mortgage before the divorce. She further stated that **Lagos** paid off the mortgage after the divorce; however, she does not recall when he did so.

87. Agents asked if she has ever received any money from **Lagos** besides the alimony and child support that was owed to her and she said stated she had not. Norma Flores subsequently stated that **Lagos** owed her approximately $40,000 from the divorce and she only collected about $15,000 after attorney fees were deducted from the amount.

88. Agents also asked Norma Flores if she has ever loaned or given any money to **Lagos**. She stated that she is currently paying **Lagos'** rent of $600 a month, paying his internet and insurance. She further stated that she gave him $5,000 for an IRS audit and also once paid to help him pay for a move. She stated that she has never loaned or paid **Lagos** any other large amounts of money.

89. Norma Flores was asked by agents what were her sources of income since her divorce and she stated that she only has received income from Rapid Tax Service. She stated that the income from Rapid Tax Services fluctuates, however her most recent K-1

from Rapid Tax Service was for approximately $30,000 and her last W-2 stated that she earned approximately $90,000. She further stated that she has not received any inheritances or other money since her divorce in 2004. She then stated that she owns three trucks which are leased to her brother's company. She stated that she earns $5,000 a month on each truck; however she has to make loan payments on all three trucks which are automatically deducted from her personal account. She stated that she does not recall what her loan payments are since they are automatically taken out of her account. However, she purchased each truck for approximately $33,000.

90. Norma Flores stated that her brother's name was Frank Flores and the name of his company is Americorp Xpress Carriers. She stated that he was the sole owner of the company and he has no other business partners. She stated that she loaned the company $100,000 of her personal money and then took out an additional loan in the amount of $100,000 under Rapid Tax Services name to loan the company. She further stated none of these loans have been repaid to date.

91. Norma Flores stated that before her brother started Americorp Xpress Carriers, he owned a salvage yard which was previous owned by their father. She stated her brother used her loan and his money to start up Americorp Xpress Carriers, however she is unaware of how much money he put into the company to start it up. She stated that **Lagos** did not put any of his money into the company.

92. Norma Flores stated that **Lagos** had a Mercedes that he asked her to put it in her name. She further stated that Americorp Xpress Carriers is currently paying the monthly payments for the Mercedes.

93. Agents asked Norma Flores why was she still helping her ex-husband **Lagos** out and she said he was a very successful person and she believed he would make money again. She further stated that she believed he would be able to pay her back the money that he owed. Agents confirmed that Norma Flores had a 2012, S550 Mercedes in her name that had an estimated purchase cost of $90,000.

94. Wendy Sanjur, **Lagos'** current wife stated that **Lagos** left her in November of 2014. She stated that **Lagos** was paying her rent, cable, utilities and also paid her $500 a week for child support for their daughter. **Lagos** was in the process of getting married to Diana Sanchez and residing at 801 S. Jay Drive in Palmview, Texas. He currently has a Mercedes Benz, a Jeep, jet skis and a brand new ATV. Sanjur stated that **Lagos** had a lot of money; however, she does not know where he was keeping the money. She stated that she had previously made a trip up to San Antonio, Texas, with **Lagos** and he purchased two purses for her which cost approximately $10,000. Sanjur stated that **Lagos** utilizes a Chase Credit Card which is in his name.

95. On May 31, 2014 a SOI (Source of Information) that stated that Sergio **Lagos** was the true owner of Americorp Xpress Carriers, LLC, and the company was put in the name of Frank Flores since **Lagos** could potentially be going to jail. Flores has little to

no authority in decision making at Americorp Xpress Carriers, LLC.

96. SOI stated that approximately 60% of Americorp Xpress Carriers, LLC business is from Ceva Logistics. The SOI stated that Simon Ruiz, was an employee and branch manager for Ceva Logistics and that Americorp Xpress Carriers, LLC bribed him to obtain business from Ceva Logistics. SOI stated that Ceva Logistics was unaware that Ruiz was receiving these bribes. Ruiz also set up a front company by the name of USA Linehaul whom Americorp Xpress Carriers wrote checks to in order to disguise these payments.

97. The SOI stated that Ruiz as currently selling his residence to **Lagos** under the table so that there was no record of **Lagos** owning the property. The residence is located at Mayberry and Jay Drive. Oscar Barbosa has two 4-wheelers which were being stored at the residence; however, since Barbosa is no longer speaking with **Lagos**, the four wheelers are still at the residence.

98. Pedro **Lagos**, who is Sergio **Lagos'** brother, owns four trucks in Americorp Xpress Carriers, LLC Fleet.

99. **Lagos** has a Harley Davidson, a Ninja Motor Cycle and a Brute Force four wheeler which he was trying to sell, which are located at his town home located off of 2nd Street in McAllen, TX. Lagos also spent approximately $40,000 remodeling this town home. The town home was not in **Lagos'** name, so he/she is unaware on why he spent all this money renovating this town home.

100. According to the case agent, Americorp Xpress Carriers wrote checks out to individuals for the sole purpose of cashing the checks and giving the cash back to Americorp Xpress Carriers, LLC. For cashing these checks, Americorp Express Carriers, LLC gave these individuals approximately $100. There was no legitimate purpose for doing so. **Lagos** would often request Noe Garcia to obtain large amounts of cash and bring it to him.

101. The SOI stated that Texas Community Bank assisted individuals in cashing checks and depositing cash from Americorp, Xpress, Carriers, LLC, without proper identification.

102. The SOI stated that **Lagos** previously forced employees of Americorp Xpress Carriers, LLC to provide statement of affidavits that the marriage between **Lagos** and his current wife Wendy was a valid marriage.

103. On July 21, 2014, Victor Ramon stated that he was previously employed by Americorp Xpress Carriers, LLC. Ramon stated that he would cash checks for **Lagos**. He clarified his statement by stating that **Lagos** would instruct Noe Garcia to issue checks in even dollar amounts to him and he would take these checks to Texas Community Bank to cash the checks. Once he cashed the checks, he would almost always give the cash directly to **Lagos**. On some occasions, he would give the cash to Noe Garcia due to the fact that **Lagos** was not available. Noe Garcia would in turn give the cash to **Lagos**. Ramon stated that he possible cashed approximately $40,000 worth of checks for **Lagos** within a thirteen month

period. He would never ask **Lagos** why he was directed to cash the checks, since **Lagos** is the boss.

104. **Lagos** had told him on numerous occasions that he was the individual who started up Americorp. Ramon stated that he had been to several parties which **Lagos** paid for. He and other employees of Americorp who also went to gentlemen clubs with **Lagos** and **Lagos** paid for all of them to go including the cost of their drinks.

105. On February 17, 2015, Noe Garcia was interviewed for a second time. Agents asked Garcia if he ever gave checks to employees of Americorp Xpress Carriers, LLC for the purpose of cashing the checks and giving the cash to Sergio **Lagos**. Garcia stated that in the past couple months; employees were given approximately $5,000 to $10,000 worth of checks to cash and return the cash to **Lagos**. Garcia stated that an employee's salary check would include their name and address on the check. However if the purpose of the check was to be cashed, the check would not have the employee's address on the check. Garcia advised agents that he was unsure about what the weekly or monthly amount of checks that were cashed by employees for the purpose of giving the cash back to **Lagos**. However, he only knew of approximately $5,000 to $10,000 worth of checks for the past couple of months. Agents informed Garcia that this had been going on since 2013 and Garcia did not deny the allegations.

106. Garcia was told by agents that some employees were receiving regular weekly payroll checks and then on random dates, they receive checks for large even dollar amounts. Employees stated that they

cashed these checks for **Lagos**. Garcia did not deny this statement however; he, stated that he did not know the purpose of all checks written to employees. Garcia stated that **Lagos** and/or Flores would often tell him to write checks to employees which were not their regular payroll checks. He stated that they would often give him invoices for the amount to write the check for.

107. Garcia stated that Frank Flores would give a certain amount of his distributions to **Lagos**; however he was uncertain on how much he was giving him.

108. Garcia stated that he was almost always the individual who writes checks for the company; however Flores signs the checks after he writes them.

109. Garcia stated that **Lagos** was barely involved in the company. He stated that Flores just keeps **Lagos** afloat financially.

* * * * *

PART D. SENTENCING OPTIONS

* * * * *

Restitution

157. **Statutory Provisions:** Pursuant to 18 U.S.C. § 3663A(c)(1) a conviction for any offense that is a crime of violence as defined in 18 U.S.C. § 16; an offense against property, including any offense committed by fraud or deceit; or an offense relating to tampering with consumer products; and the offense involves an identifiable victim or victims who have suffered physical injury or pecuniary loss, the Court

shall order, in addition to any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate. The Court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

158. Pursuant to 18 U.S.C. § 3663A(c)(3), only in the case of an offense against property, including any offense committed by fraud or deceit, is restitution not mandatory, but only if the Court finds on the record that (1) the number of identifiable victims is so large as to make restitution impracticable or; (2) determining complex issues of fact related to the cause or amount of the victim's losses would unduly complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

159. In each order of restitution, the Court shall order restitution to each victim in the full amount of each victim's losses as determined by the Court and without consideration of the economic circumstances of the defendant, pursuant to 18 U.S.C. § 3664(f)(1)(A). However, in determining the manner in which, and the schedule according to which, the restitution is to be paid, the Court shall consider the financial resources and assets of the defendant, including whether any are jointly controlled; projected earnings and other income of the defendant; and any financial obligations of the defendant, including obligations to dependents, pursuant to 18 U.S.C. § 3664(f)(1)(B).

160. Restitution in the total amount of $11,760,666.84, due and payable to General Electric Capital Corporation (GECC), Legal Department, GE Capital-Transportation Finance, 1010 Thomas Edison Blvd, SW, Cedar Rapids, Iowa 5204-8247.

161. Guideline Provisions: In accordance with the provisions of U.S.S.G. § 5E1.1, restitution shall be ordered. A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments or a combination of payments at specified intervals and in-kind payments.

162. The Court may direct the defendant to make nominal periodic payments if the Court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amounts of restitution order and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

163. Pursuant to U.S.S.G. § 5B1.3(a)(6) (Mandatory Conditions of Probation) and § 5D1.3(a)(6) (Mandatory Conditions of Supervised Release), payment of restitution shall be a condition of supervision.

Money Judgement

164. The Indictment notifies all defendants that upon conviction, a money judgment may be imposed equal to the total value of property subject to forfeiture, for which the defendant may be jointly and severally liable. That amount is estimated to be, but is not limited to, approximately $26,254,781.

* * * * *

Respectfully submitted,

SEAN HARMON,
Acting Chief United States Probation Officer

By: Hugo E. Mejia
United States Probation Officer

Approved:

Javier Garcia, Supervising
United States Probation Officer
Date: July 10, 2015

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Docket No. 4:13CR00554-001

UNITED STATES

v.

SERGIO FERNANDO LAGOS

Filed: October 29, 2015

ADDENDUM TO THE PRESENTENCE REPORT

The probation officer certifies that the Presentence Report (PSR), including revisions, has been made available to the defendant, his attorney, and the counsel for the Government, and that the Addendum fairly states any objections they have made. The original PSR has been available since July 10, 2015.

OBJECTIONS

BY THE GOVERNMENT

The PSR was electronically disclosed to counsel for the Government on July 10, 2015. On August 7, 2015, counsel for the Government filed an objection to the Presentence Report. On October 26, 2015, counsel for the Government filed Modified Objections to the Presentence Investigation Report and Request for Restitution. The probation officer will respond to the Modified Objections summarized below.

I. **The Amount of Loss Should be Offset by Disposition of Collateral**

Based on the defendants' fraudulent scheme, GE Capital was induced to loan the defendants' company $35,000,000.00. This represents the intended loss caused in this case. However, the defendants' pledged collateral to obtain this line of credit. The financing agreement executed between the defendants and GE Capital provided that the loan was secured by collateral. The agreement defined "collateral" as "all present and future accounts; chattel paper, instruments; general intangibles; documents; all assets including, without limitation; inventory, equipment of every kind and description; furniture and fixtures; deposit accounts; money; investment property; letters of credit; notes; tax refund and insurance proceeds." GE Capital recovered monies from the disposition of various collateral, detailed in the original victim impact statement (see Government's Exhibit 1). After recovery of those monies, GE Capital was and is still owed $11,074,047.64, which represents the unsecured principal amount of the loan. This amount does not include interest nor does it include fees for attorney or other expenses. (See Government's Exhibit 2). Therefore the Government submits that the amount of loss for guideline purposes is $11,074,047.64, warranting a 20-level increase, pursuant to U.S.S.G. § 2B1.1(b)(1)(K).

Response: In the PSR, the probation officer noted that the $35,000,000.00 line of credit was determined by, and collateralized by, the accounts receivable. This investigation revealed the defendants engaged in a conspiracy to fraudulently inflate the accounts receivable by $26,725,000.00. This uncollateralized amount was determined to be the intended loss. However, the

Government now asserts the agreement for USADV also included all of the company's assets as part of the collateral pledged. The information provided in the investigative materials reflected the defendants made draws on the line of credit totaling in excess of $28,000,000. In the Government's recent filings, the Government asserts the total value of collateral pledged and recovered is over $29,000,000.00. Since the defendants are entitled to a credit for the value of any and all collateral against any loss, this would reflect there was no intended loss. However, the guidelines instruct that loss for purposes of guideline computation is the greater of actual and intended loss. Therefore, based on the information provided by the Government, the loss for guideline calculations should be the actual loss of $11,074,047.64. The Presentence Report is revised via this Addendum to reflect that the defendant should he held accountable for an actual loss amount of $11,074,047.64.

Base Offense Level: 2B1.1- 7

Specific Offense Characteristic: Since the loss of $11,074,047.64, exceeded $9,500,000, but was less than $25,000,000, the offense level is increased by 20 levels pursuant to U.S.S.G. § 2B1.1(b)(1)(K).

The offense otherwise involved the use of sophisticated means; and therefore, pursuant to U.S.S.G. § 2B1.1(b)(10)(C), the offense level is increased by 2.

Adjustment for Role in the Offense: Pursuant to U.S.S.G. § 3B1.1(a), the offense level is increased

by 4, as the defendant is deemed an organizer/leader of a criminal activity that involved five or more participants or was otherwise extensive.

Based on a Total Offense Level of 33 and a Criminal History Category of I, the guideline range yields 135 to 168 months and a fine range of $17,500 to $175,000.

This revision is based on November 1, 2015 edition of the Guideline Manual.

II. Restitution

The Government asserts that GE Capital was required to spend an inordinate amount of resources investigating the extent of the defendants' fraud to determine the amount of actual loss.

a. $ 11,074,047.64 (actual loss to victim: unsecured principal balance on loan)
b. $ 787,897.88 (actual loss to victim: legal fees in bankruptcy proceedings)
c. $ 20,092.32 (forensic expert fees in investigating fraud)
d. $ 1,776,290.24 (legal fees in investigating fraud)
e. $ 2,311,189.29 (consulting fees in investigating fraud)

Therefore, the total amount of restitution should be $15,970,517.37.

Response: The probation officer takes no issue and concurs with the Government that the identified cost of investigation incurred by the GE Capital should be included in the total restitution amount. Therefore, the Presentence Report is revised to reflect the total restitution amount of $15,970,517.37, due and payable to GE Capital.

BY THE DEFENDANT

The defendant, by way of his attorney, filed the following objections to the PSR on August 10, 2015.

Objection #1: The defendant argues that the loss amount should be reduced by the disposition of collateral recovered by General Electric. The total amount that General Electric reported they were owed is $11,760,666.84. The defendant believes that the correct loss amount should be $11,760,666.84 (minus any interest or late charges).

> **Response:** Pursuant to U.S.S.G. § 2B1.1. comment (n.3(D)(i)), *Exclusions from Loss. – Loss shall not include the following: Interest of any kind, finance charges, late fees, penalties, amounts based on an agreement-upon return or rate of return, other similar costs.* The loss amount provided to the probation officer did in fact include interest and late charges. The probation officer has received additional information from the Government which indicates the loss amount owned to GE Capital, less any interest or penalty fees and collateral recovered by GE; such total amount is $11,074,047.64. Therefore, the probation officer concurs with the defense.

Objection #2: The defendant argues that General Electric's loss figure of $11,760,666.84, does not discount or explain what part of that amount derives from interest and late charges, which the guidelines explain should not be applied to the total loss figure.

> **Response:** See the probation officer's response to Defendant's Objection #1.

* * * * *

Objection #7: The defendant argues that the restitution figure includes late fees and interest.

Response: See the probation officer's response to Objection #1.

Respectfully submitted,

LUIS LOPEZ,
Acting Chief United States Probation Officer

/s/ Javier G. Garcia
By: Hugo E. Mejia
United States Probation Officer

Approved:

/s/ Javier G. Garcia
Javier Garcia, Supervising
United States Probation Officer
Date: October 28, 2015

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

No. 4:13-CR-554

FILED UNDER SEAL

UNITED STATES OF AMERICA

v.

SERGIO FERNANDO LAGOS

Filed: December 5, 2015

DEFENDANT'S RESPONSE TO THE GOVERNMENT'S PRESENTENCE INVESTIGATION REPORT OBJECTIONS AND RESPONSE TO THE ADDENDUM TO THE PRESENTENCE INVESTIGATION REPORT

Defendant Sergio Lagos files this Response both the PSR Objections of the Government and to the Addendum of the Presentence Investigation Report. This filing is made primarily to narrow the contested issues that the Court will face at sentencing on Monday, December 7, 2015.

1. The U.S.S.G. § 2B1.1(b)(1) loss objection is resolved.

The defense objected to the loss amount of $26,254,781 in the PSR because it improperly included in-

terest and failed to offset loss by pledged collateral as required by U.S.S.G. § 2B1.1 cmt. n. 3(E)(ii). Those objections are addressed in the PSR Addendum, which offsets loss by the collateral that General Electric Capital Corporation (GECC) recovered, and does not include lost interest. Lagos does not object to the loss amount of $11,074,047.64. PSR Addendum at 2.

2. **The U.S.S.G. §3B1.1 leader organizer objection is withdrawn.**

The defense withdraws its objection to the four level leader organizer adjustment involving five or more participants.

3. **Acceptance of responsibility points should be given pursuant to U.S.S.G. § 3E1.1.**

Probation has not applied acceptance of responsibility points because Lagos has not submitted an acceptance of responsibility letter. PSR Addendum at 4. On December 4, 2015, counsel sent a signed acceptance of responsibility letter via email to the probation officer. Probation advised counsel to submit the letter to the Court. The defense, therefore, will present an acceptance of responsibility letter singed by Mr. Lagos at sentencing.

Nonetheless, Lagos accepted responsibility for this offense a long time ago. Specifically, on January 25, 2010, Lagos and codefendants Jim Aleman and Oscar Barbosa personally met with GECC representatives and explained that they had been inflating their accounts to increase the USADV borrowing base. The next day, Lagos and Barbosa explained to GECC in detail how the fraud was committed. This was all long before the government was ever involved in this case.

Memoranda of interview of Oscar Barbosa and Sergio Lagos show that Lagos spearheaded the idea for the three to disclose this conduct to GECC. The memoranda further show that Jim Aleman, at least initially, resisted going to GECC and wanted to continue the fraud, but Lagos insisted that it be disclosed.

To refuse acceptance of responsibility points to Lagos when he willingly disclosed this fraud to GECC would be counterproductive in a system of justice that encourages individuals to step forward and admit to criminal conduct on their own. In fact, it would run contrary to the norms of society and what most children are taught early in life: If you break a rule, be honest and own up to it. Lagos owned up to his criminal conduct early on. He explained it in detail to GECC, before the government was ever involved. That honesty should not be ignored; it should be rewarded.

4. Objections to paragraphs 60 to 109.

Lagos maintains his objections to paragraphs 60 through 109, which are identified by the PSR as, "offense behavior not part of relevant conduct." PSR at pg. 14. Lagos will address these allegations to the extent that they are of concern to the Court at sentencing.

5. Restitution—attorney's fees and other "recovery losses" cannot be counted under the MVRA.

Although the § 2B1.1 loss issues have been resolved, restitution has not. In addition to the 11,074,047.64 in actual losses, the government is seeking losses incurred in seeking to recover property ("recovery losses") for GECC in the amounts of:

a. $787,897.88, for legal fees in bankruptcy proceedings.

b. $20,092.32, for forensic expert fees in investigating fraud.
c. $1,776,290.24, for legal fees in investigating fraud.
d. $2,311,189.29, for consulting fees in investigating fraud.

See PSR Addendum at 2. Inclusion of these is improper.

First, Lagos and his two co-defendants gave this case on a silver platter to GECC and ultimately to the government, by confessing to and explaining their accounting practices in detail in January of 2010. The notion that GECC was forced to spend over $4 million for nonspecific legal and "investigating" fees (which are only loosely supported by a "victim impact" statement that is not even signed must less sworn to) is preposterous.

Second, the Fifth Circuit has specifically held that losses, including attorney's fees, incurred by a victim attempting to recover stolen property cannot be included in a restitution award under the MVRA. *United States v. Onyiego*, 286 F.3d 249, 256 (5th Cir. 2002). In *Onyiego*, the Fifth Circuit reversed and remanded a restitution order that included attorney's fees that the victim travel agency incurred as a result of lawsuits seeking to collect on stolen airline tickets. *Id.* at 251-52, 256. The court analogized such attorney fees with "recovery losses," which cannot be included in a restitution order. *Id.* at 256 (citing *United States v. Mitchell*, 876 F.2d 1178, 1184 (5th Cir. 1989) ("There is no provision in the restitution Act authorizing restitution for lost income, cost of restoring property to its pre-theft condition, or cost of employing counsel to recover from an insurance company.") It reversed and remanded the trial court's restitution order for including attorney's fees. Lagos objects to inclusion of these recovery losses in the order of restitution.

6. The proper guideline calculation.

The correct guideline calculation in this case is:

a. Base offense level 7

b. Loss increase 20

c. Sophisticated means 2

d. Role adjustment 4

e. Acceptance of responsibility ..... -3

Total 30

This calculation correspond with an advisory guideline range of 97 to 121 months.

Respectfully submitted,

/s/ Dan Cogdell
Dan Cogdell
TBN: 04501500

/s/ Dennis Hester
J. Dennis Hester
TBN: 24065415

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CERTIFICATE OF SERVICE

I certify that I filed a true and correct copy of the foregoing under seal via the ECF system. The system sent a "notice of filing" to all interested parties and a copy was served on the Assistant United States Attorney and United States Probation via email.

/s/ Dan Cogdell

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal No. H-13-554 (1)

FILED UNDER SEAL

UNITED STATES OF AMERICA

v.

SERGIO FERNANDO LAGOS

Filed: January 31, 2016

OPPOSED MOTION TO CALL WITNESSES AT SENTENCING

NOW COMES the United States of America, through Kenneth Magidson, United States Attorney, and the undersigned Casey MacDonald, Assistant United States Attorney, and files this Opposed Motion to Call Witnesses at Sentencing.

I. Government's Need to Call Witnesses

The Government needs to call witnesses to address issues raised in defendant's Response to the Addendum to the Pre-sentence Report and Government's Objections filed on December 5, 2015, wherein the defendant challenges the restitution amounts requested by the victim GE Capital, in victim impact statements. Specifically, the witnesses will address the defense notion that the defend-

ants "gave this case on a silver platter to GECC," the defense description of GE Capital's restitution request as "preposterous," and the defense implication that GE Capital is inventing and/or exaggerating expenses incurred to them as a consequence of the defendant's offense. These factual disputes can only be resolved by testimony from witnesses from GE Capital. Additionally, the Government needs to ensure there is a factual record for appellate purposes. Lastly, the victim has the right to address the Court prior to sentencing to describe the impact of the offense.

The Government also needs introduce evidence in order make an evidentiary record of recently discovered conduct not addressed in the PSR that is also the subject of Government's Objections to the PSR filed as D.E. . Rule 32(i)(2) of the Federal Rules of Criminal Procedure provides that the court may permit parties to introduce evidence on the objections.

Lastly, the Government may seek to adduce testimony from the co-defendants in this case to address other issues raised in the defendant's filings on December 5, 2015, concerning the defendant's surrendering of assets and the nature and circumstances of the offense.

If the defense does not object, the Government is willing to proceed by way of proffer in leiu of testimony from witnesses on issues in dispute in order to expedite the sentencing proceedings.

II. Potential Witnesses

Below is a list of potential witnesses the Government may call at sentencing:

1. Kathleen Turland, Executive Counsel—Litigation,

GE Capital
2. Aamir Moinuddin, Vice President, Workout/Loss Mitigation, GE Capital
3. Frank Flores
4. Leticia Rodriguez
5. Oscar Barbosa
6. Jim Aleman
7. Derek Lacina, Special Agent Homeland Security Investigations (case agent)
8. Isabel Barberena, FBI forensic accountant
9. Maria Flores, FBI forfeiture specialist

III. Conclusion

For the foregoing reasons, the United States respectfully requests that its Motion to Call Witnesses at Sentencing be Granted.

RESPECTFULLY SUBMITTED this 31st day of January, 2016.

By: */s/ Casey N. MacDonald*
Casey N. MacDonald
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CERTIFICATE OF CONFERENCE

I hereby certify that on the 27th day of January, 2016, I conferred with Defendant's attorneys of record, Dan L. Cogdell and Dennis Hester, and they indicate they were **OPPOSED** to this motion.

s/ Casey N. MacDonald
Casey N. MacDonald

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Government's Motion to Call Witnesses at Sentencing was served to the Defendant's attorneys of record, Dan L. Cogdell and Dennis Hester, and the U.S. Probation Office by e-mail, on this 31st day of January, 2016.

s/ Casey N. MacDonald
Casey N. MacDonald
Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal No. 4:13-CR-554-1

UNITED STATES OF AMERICA

vs.

SERGIO FERNANDO LAGOS

Entered: February 2, 2016

SEALED ORDER ON OPPOSED MOTION TO CALL WITNESSES AT SENTENCING

On this day came to be considered the Opposed Motion for to call Witnesses at Sentencing. Upon consideration of the motion, this Court is of the opinion that the Motion should be Granted.

The Court as a matter of policy does not permit the calling of witnesses at sentencing except expert or victim impact statements. All matters for Court consumption are to be submitted in writing no later than the Friday before a Monday sentencing.

It is so **ORDERED.**

SIGNED on this 2nd day of February, 2016.

/s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States District Judge